STATE OF WISCONSIN
COURT OF APPEALS
District 2

Case No. 97-1504

CITY NEWS & NOVELTY, INC.,

Plaintiff-Appellant,

v.

CITY OF WAUKESHA,

Defendant-RespondenT.

PRINCIPAL BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Appeal From the Decision of the Circuit Court for
Waukesha County, Branch 11, Entered in
Case No. 96-CV-1427, Entered April 2, 1997.
The Honorable Robert G. Mawdsley, Presiding

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I. Is Waukesha's licensing ordinance unconstitutional in that it fails to provide adequate procedural safeguards?

The trial court ruled that it is not unconstitutional.

II. Was City News and Novelty denied due process in the denial of its license?

The trial court ruled that it was not.

III. Were the grounds upon which nonrenewal was predicated inadequate as a matter of law?

The trial court ruled that they were not.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents both issues which are purely legal in nature, such as whether the ordinance used by the City of Waukesha to denial renewal of a license to City News and Novelty is facially unconstitutional, and mixed issues of law and fact, such as whether City News and Novelty received adequate due process in the hearing which resulted in the revocation of its license. It is expected that the briefs of both parties will fully present the issues on appeal and will fully develop the legal authorities which are the basis for determination of these issues; consequently oral argument will probably be helpful only if the Court has questions about the positions, or the grounds therefor, of the parties.

Publication of the Court's opinion will undoubtedly be appropriate because there are few published cases in the State of Wisconsin which deal with the procedural safeguards

which are required in licensing a business which disseminates materials protected by the First Amendment. Consequently, this decision will apply an established rule of law to a fact situation significantly different from that in other published opinions and will resolve a matter of substantial and continuing public interest, in that it will articulate the resolution of two important principles which are sometimes opposed to one another: the need for free and unfettered dissemination of expressive material and the desire of local governments to regulate such businesses.

STATEMENT OF THE CASE

The appellant, City News and Novelty, Inc., is a corporation which operates an adult-oriented establishment located at 245 West Main Street in the City of Waukesha. In years past, City News and Novelty, Inc., has received and renewed annually its license to operate its establishment under the provisions of § 8.195 of the Municipal Code of the City of Waukesha; the most recent license was due to expire January 25, 1996. (A-1) On November 15, 1995, City News and Novelty, Inc., applied for renewal of its license. (A-7)

On December 19, 1995, the Common Council of the City of Waukesha passed a Resolution which found City News and Novelty, Inc., had committed several violations of the ordinance, and as a result of those purported violations, denied the renewal of its license. (A-1)

12/1/94, and 12/2/94; permitting a minor to loiter on the premises on 7/23/95, 10/18/95, and 11/29/95; the actions of a patron of the store having exposed himself to an employee on 9/12/94, for which the patron was convicted of lewd and lascivious conduct on April 12, 1995; the actions of a patron engaging in sexual conduct inside a viewing booth on 2/28/95 for which he was convicted of lewd and lascivious conduct on November 2, 1995; and the activity of a patron on 3/12/95 engaging in sexual conduct inside a viewing booth for which he was convicted of lewd and lascivious conduct on December 1, 1995. (A-1) The Resolution was signed by Mayor Carol Opel. (A-2)

In its decision, the Board did not mention, and apparently did not rely on, the 9/12/94 incident; however, the Board did find evidence of the remaining allegations and found them to be a sufficient basis for affirming the nonrenewal of the plaintiff's license. (A-11-18)

The Administrative Review Hearing, which began on April 2, 1996, was presided over by the Waukesha Administrative Review Board, consisting of Mayor Opel, Alderman Seidl, and Ralph North, III, a citizen appointed to the Board. (A-19) At the outset of the hearing, counsel for City News and Novelty, Inc., objected to the composition of the Board on the grounds that Mayor Opel had participated in the previous

decision. (Tr., 41)[1] This objection was overruled. (Tr., 41)

City News and Novelty, Inc., presented the testimony of a clerk, David Hull, who testified to the measures taken by City News and Novelty, Inc., to insure that all patrons were at least 18 years old. Mr. Hull testified that clerks are required to check ID, that there are numerous large signs throughout the store which indicate that customers must be 18, and that the store had recently purchased a machine which videotapes all customers entering the store and photographs the ID the used by each customer. Mr. Hull also testified that the video booths had been removed from the store. (Tr., 108-126)

The City presented testimony from Police Officer DeJarlais, who testified that on March 11, 1995, he arrested a patron, Hector Munoz, whom he observed to be masturbating in a video booth. (Tr., 150-151) Sergeant Piagentini testified that on December 24, 1994, he charged City News and Novelty clerk Peggy Lindsley with allowing a minor in the store because a girl who was two weeks away from her 18th birthday, using a false photo ID, was in the store. Corporate officer Dan Bishop was also charged. (Tr., 233) Both Ms. Lindlsey and Mr. Bishop had been convicted in municipal court, and the

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[1] The hearing was held on four different dates, resulting in four different transcripts. References to pages of the hearing transcript will be as follows: hearing on April 2, 1996: (Tr., ___); April 9, 1996, hearing: (Tr2., __); May 7, 1996, hearing (Tr.3, ___); May 8, 1996, hearing (Tr4., ___).

cases were then on appeal to the circuit court. (Tr., 244) The convictions were subsequently overturned by the circuit court in a decision filed November 21, 1996. A-50.

Building Inspector Lemke testified that on November 7, 1994, during his annual inspection of City News and Novelty, he had observed that the openings of the booths were somewhat narrowed by partitions on each side of the opening. (Tr., 251) He testified that by November 30, 1994, all the narrowing partitions had been removed, and that the booths had been returned to the condition in which they had been when they passed previous inspections. (Tr., 273)

Detective John Gibbs testified that on February 28, 1995, he arrested Bruce Wickland after observing him masturbating in a video booth. (Tr., 286-287) He indicated that Wickland has a prior record, that he was ordered to undergo a sexual adjustment course, and that, in his opinion, Wickland was a sexual deviant. (Tr., 294-296) He, and other officers, testified that the clerk in the front of the store could not have seen what was going on in the video booth area at the rear of the store. (Tr., 288)

Officer John Konkol testified that on July 23, 1995, he observed a customer in the store, Sarresa Stolpa, who was known to him to be under age 18. (Tr2., 9) As a result, Ms. Stolpa was arrested for disorderly conduct. (Tr2., 17) Ms. Stolpa confirmed that on July 23, 1995, she had been only 17 years old. (Tr2., 46) She also testified that the clerk who

was on duty at the store at the time may have believed her to be 21 because he had frequently seen her in taverns which she had been frequenting four to five times per month for the past two years. (Tr2., 51)

Detective Paikowski testified that on November 29, 1995, he encountered a 17 year-old male in the store. (Tr2., 58)

Officer Mark Howard testified that on October 18, 1995, he encountered three young men, Paul Comstock, Sonny Dietscher, and Justin Uphill, with water pipes from City News and Novelty. (Tr2., 74, 84) Of these, Uphill was 19, and the other two were 17. (Tr.2, 78) Justin Uphill testified that the water pipe had been stolen from City News and Novelty; he had kept the clerk busy while Sonny effected his entrance. (Tr2., 133) When the clerk went to check Sonny's ID, Uphill stole the pipes. (Tr2., 134) Sonny Dietscher also testified, and said that he waited outside while Uphill and Comstock entered the store. (Tr3., 13) Comstock came out, saying he had been carded and could not get in. (Tr.3, 13, 24) He reiterated that the plan had been for Uphill to distract the clerk while Sonny stole the pipes. (Tr.3, 24)

Tim Morgan testified that on March 7, 1996, when he was 17, he had been in City News and Novelty for approximately 10 minutes, during which time he stole about six magazines and then left the store. (Tr.3, 37, 50)

Patrolman Dennis Angle testified that recently the store has been rearranged so that the video viewing booths have been eliminated and the entrance to the store has been restructured so that a person entering the store cannot see any sexually explicit merchandise until passing through the identification checkpoint. (Tr.3, 88, 114, 118-120) Angle also testified that the new identification video monitor which is in use at City News and Novelty is the only one of its kind in Waukesha, and he does not know of any minors being able to sneak into the store since it was installed. (Tr.3, 111-113, 131)

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO

On certiorari, this Court reviews an administrative decision by determining whether the administrative agency kept within its jurisdiction, acted according to law, acted arbitrarily, or made a reasonable determination upon the issue in question. Schmidt v. Wisconsin Employee Trust Funds Board, 153 Wis. 2d 35, 449 N.W.2d 268 (1990). Whether an administrative agency has jurisdiction to act, or acts according to law, presents a legal issue which the court reviews ab initio. Republic Airlines, Inc. v. Wisconsin Department of Revenue, 159 Wis. 2d 247, 464 N.W.2d 62 (Ct. App. 1990). In a certiorari case, the court applies the "substantial evidence test" to determine whether the evidence is sufficient. Clark v.

Waupaca County Board of Adjustment, 186 Wis. 2d 300, 510 N.W.2d 782 (Ct. App. 1994). The issues raised in this case involve constitutional questions and questions of statutory construction. These are questions of law, which the court reviews de novo. City of Waukesha v. Town Board of Waukesha, 198 Wis. 2d 592, 543 N.W.2d 515 (Ct. App. 1995).

II. THE WAUKESHA LICENSING ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROVIDE ADEQUATE PROCEDURAL SAFEGUARDS. AS A RESULT, THE ACTION OF THE COMMON COUNCIL WAS NOT "ACCORDING TO LAW."

A. Waukesha's Licensing Ordinance is Unconstitutional in that There Are No Explicit Standards for Renewal of Licenses.

A municipal government may regulate sexually oriented businesses which are presumptively protected by the First Amendment, including adult bookstores, only in an effort to address the undesirable secondary effects which are associated with them. Renton v. Playtime Theaters, 475 U.S. 41, 106 S.Ct. 925 (1986). However, all expression, including that which is sexually explicit but not obscene, is entitled to protection by the First Amendment to the United States Constitution and Article I, Section 3 of the Wisconsin Constitution. First and foremost among these protections is that a government cannot restrain expression, including the denial of a license, based on the content of the materials in the store. Id. All restrictions, including nonrenewal of a license, based on the contents of a bookstore presumptively violate freedom of expression which is constitutionally

protected. "Content neutral" regulations are acceptable as long as they serve a substantial government interest, are narrowly tailored, and do not unreasonably limit alternative avenues of communication. Id. at 47.

All licensing is a form of censorship in that before a bookstore can sell one videotape or one magazine, each of which are considered speech, or expression, it must obtain permission to do so from the city. Southeastern Promotions, Ltd. v. Conrad, 402 U.S. 546 (1975). Because licensing a premises which deals in constitutionally protected expressive material constitutes a "prior restraint," the United States Supreme Court has designated specific procedural safeguards which have been determined to be necessary to protect freedom of expression. In 1965, the Supreme Court announced three such protections which are required whenever there is prior restraint involving expressive materials: the burden of proof must be on the party seeking the restriction (i.e., the licensing regulation); the decision must be made within a brief period of time; and the law governing whether or not the license will be granted cannot place "unbridled discretion" in the hands of the government. Freedman v. State of Maryland, 380 U.S. 51, 59 (1965). On many occasions, the Supreme Court has reiterated the guidelines set out in Freedman and has explained their application. The Court has continually held that any prior restraint in licensing "without narrow, objective, and definite standards to guide the licensing

authority" is unconstitutional. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

The requirement that a city not use "unbridled discretion" means that whenever a city seeks to license adult bookstores, the city must have objective, discernible standards for licensing set forth in the ordinance which pertains to licensing, and that it must adhere very narrowly to the explicit terms of the licensing ordinance. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988). Unless a licensing ordinance contains explicit standards, which limit discretion, the ordinance is unconstitutional. Wolff v. City of Monticello, 803 F.Supp. 1568, 1574 (Minn. 1992). By these criteria, Waukesha's ordinance is defective in at least three respects.

Licensing of adult bookstores is governed by Waukesha ordinance § 8.195. (A-41-49) The most obvious defect is that the ordinance contains no standards which obviously govern license renewal. Section 8.195(7), entitled "Renewal," requires that every license terminates one year from the date of issuance and must be renewed before operation is allowed the following year; each operator desiring to renew a license must make an application to the city clerk which must be filed not later than 60 days before the license expires; the application for renewal is on a form provided by the city clerk and contains information and data given under oath such as is required for an application for a new license.

This section of the ordinance also provides for a renewal fee of $250.00 to be provided with the application for renewal. It also provides that if the city police department is aware of information "bearing on the operator's qualifications," that information shall be filed in writing with the city clerk. This is quite literally all that is said in regard to license renewals.

Although the ordinance does contain standards for the issuance of a new license, at § 8.195(4), as well as standards for revocation and suspension of an existing license, at § 8.195(8), there are absolutely no standards set out which govern renewal of an existing license. The Board, having no jurisdiction to hold an ordinance unconstitutional, disregarded the appellant's objections to the complete lack of standards governing renewals, and utilized the standards for the granting of a new license, set forth at § 8.195(4). However, as this court does have jurisdiction to consider the constitutionality of the ordinance, the appellant urges the court to find the ordinance unconstitutional due to lack of specific standards governing license renewals.

Even leaving aside the lack of any standards specifically governing license renewals, the ordinance is further defective because nowhere does the ordinance state that if the standards for a new license are met, the license must be issued. Specifically, § 8.195(4)(b) states that to receive a license to operate, a corporate applicant must meet

the following standards: all officers, directors and stockholders must be at least 18 years old, and no officer, director or stockholder shall have been found to have previously violated the ordinance within five years prior to the date of the application. However, in order to be constitutionally effective, the ordinance must also state that any corporation which does not violate these provisions must be granted a license. Wolff, supra, at 1574.

This failure is fatal. The Wolff Court found a similar ordinance unconstitutional because there was no provision in the ordinance requiring the granting of license applications for applicants not rendered ineligible. Id. The same concern was addressed by the United States Supreme Court:

> The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens. . . . This presumes the mayor will act in good faith and adhere to standards absent from the ordinance face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. (citation omitted) The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.

Lakewood, supra, 486 U.S. at 770.

In addition, the ordinance permits unbridled discretion because § 8.195(4)(d)2 is unduly vague in permitting denial of a license if the corporate applicant "has been found" to have previously violated the ordinance without sufficient definition of what level of proof such a "finding" would entail, i.e., a mere accusation, a municipal citation,

a conviction in municipal court, or a conviction in a court of record. Shuttlesworth, supra. The Supreme Court has cautioned, "because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967). The licensing ordinance, by using language which is capable of multiple definitions, has created constitutionally unacceptable ambiguity where "men of common intelligence must necessarily guess at its meaning and differ as to its application." Id. Like the regulation found unconstitutional by the Keyishian Court, the phrase "has been found" is "wholly lacking in terms susceptible of objective measurement." Id. To survive a vagueness challenge, a regulation must "permit law enforcement officers . . . to enforce and apply the law without forcing them to create their own standards." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Where the regulation in question prohibits expression, "the standards of permissible statutory vagueness are strict." NAACP v. Button, 371 U.S. 415, 432 (1963). The United States Supreme Court has said:

> If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, supra, 408 U.S. at 108-109.

The Wisconsin Supreme Court has similarly held that the regulation must define its standards "with sufficient definiteness that there is an ascertainable standard of guilt." State v. Tronca, 84 Wis. 2d 68, 267 N.W.2d 216, 224 (1978). Due process requires that a regulation set forth both fair notice of the conduct prohibited as well as proper standards for enforcement and adjudication. State v. Popanz, 112 Wis. 2d 166, 332 N.W.2d 750, 754 (1983). The danger posed by a regulation whose standards are vague is that those who seek to enforce the regulation may apply it arbitrarily. State v. Courtney, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976). The requirement that the legislative body establish minimal guidelines to govern enforcement of a regulation has been recognized to be "the more important aspect of the vagueness doctrine." Kolender v. Lawson, 461 U.S. 352, 357-58 (1983). Where, as here, a provision allows the enforcing body "to create and apply their own standards." Popanz, supra, 112 Wis. 2d at 173, 332 N.W.2d at 754 (citation omitted), the statute is invalid. Id.

Concerns about unbridled discretion or standards which are vague, and hence open to subjective decision making, are enhanced in the case of license renewals as opposed to initial applications for licensure. The Supreme Court has noted that the need to reapply annually for a license enables a licensing authority to subject the forum of expressive activities to discipline (i.e., censorship) for unpopular

speech which has already been uttered. City of Lakewood v. Plain Dealer Publishing Co., supra, 486 U.S. 750, 759-60. The Seventh Circuit has also voiced this concern, noting that licensing systems which require annual renewals may facilitate "content discrimination" in licensing of expressive fora. Graff v. City of Chicago, 9 F.3d 1309, Judge Flaum's concurrence, p. 1329 (7th Cir. 1993) (en banc), cert. denied 114 S.Ct. 1837. Thus, the dangers inherent in the Waukesha ordinance, which contains no specific standards for renewal, and permits vague, subjective discretion to be exercised in the case of license applications, are exacerbated in circumstances, as here, where a store selling politically unpopular expressions must seek renewal on an annual basis. The Lakewood Court cautioned that demonstrating the link between the expressive content and the subsequent denial of license renewal might well prove impossible; as a result, the Court has authorized facial challenges of suspect ordinances. Lakewood, supra, at 759, 108 S.Ct. at 2148.

B. Waukesha's Licensing Ordinance Is Unconstitutionally Defective in Regard to Time Limits.

In 1990, the United States Supreme Court examined a comprehensive licensing and zoning ordinance of adult businesses in Dallas, Texas. The Court found the licensing portion of the ordinance to be unconstitutional because, although the ordinance required the chief of police to approve the issuance of a license within 30 days following receipt of

the application, the ordinance also contained a provision which allowed the license not to be issued until the premises were approved by health and fire departments. The Court read this to mean that the license might not in fact be issued within 30 days, as there was no certain time limit set on the inspections of the health and fire departments. The Court found that the city's licensing ordinance law allowed "indefinite postponement of the issuance of a license." FW/PBS, Inc. v. City of Dallas, 393 U.S. 215, 217, 110 S.Ct. 596, 606, 107 L.Ed. 2d 603 (1990).

The Waukesha ordinance, at § 8.195(3)(c), requires the city to notify an applicant within 21 days of receipt of the application whether the license has been granted or denied. However, § 8.195(7) requires an applicant for a renewed license to file the application not later than 60 days in advance of the license expiration date. Presumably, by requiring the 60-day period, the city seeks to give itself an ample period of time within which to consider and dispose of the application for license. Section 8.195(7)(c) requires the police department, if aware of any information bearing on the operator's qualifications to hold a license, to file such information in writing with the city clerk, but no time limit is indicated. Section 8.195(7)(d) requires the city building inspector to inspect the premises prior to renewal of a license, but no time limit is indicated. Clearly, all of these factors are capable of combining, just as the factors in

FW/PBS were so capable, to delay the 21-day time period and render it illusory. In fact, in this case, the application for renewal was filed on November 15, and the notification of denial did not come until 35 days later, following the December 19, 1995, Resolution. (A-7)

In explaining the importance of time limits in regard to constitutionally protected expression and licensing schemes, the Supreme Court said:

> The core policy underlying Freedman is that the license for a First Amendment protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.

FW/PBS, supra, at 224.

In determining whether time limits are satisfactory, federal courts have held that the licensing ordinance must be explicit and must guarantee an absolute right to operate in a short period of time, regardless of other considerations.

> The issue . . . . is whether the ordinance, on its face, meets the requirements of FW/PBS . . . . We cannot depend on the individuals responsible for enforcing the ordinance to do so in a manner that cures it of constitutional infirmities. [The ordinance] says that applicants may be permitted to begin operation; it does not say 'shall'. We do not read this language to create an absolute right to operate at the expiration of the 45 days. On its face, therefore, [the ordinance] risks the suppression of protected expression for an indefinite time period prior to any action on the part of the decision maker or any judicial determination.

Redner v. Dean, 29 F.3d 1495, 1501 (11th Cir. 1994), cert. denied, 115 S.Ct. 1697 (1995)

The Fourth Circuit has recently voiced similar concerns, finding an ordinance requiring licensing of adult businesses unconstitutional because of potential indefinite delay as a result of inspecting agencies having no time limits set, with the attendant possible delay to the entire licensing process. Chesapeake B & M, Inc. v. Harford County, Maryland, 58 F.3d 1005, 1009 (4th Cir. 1995) (en banc), cert. denied, 116 S.Ct. 567.

The Waukesha licensing ordinance runs afoul of the constitutional mandate of definitive time limits in another way. Another element of the procedural safeguards which the Supreme Court found essential in an ordinance which restricts freedom of expression by licensing it is "prompt judicial review in the event that the license is erroneously denied." FW/PBS, supra at 228, 110 S.Ct. at 606. However, due to the lack of a clear-cut majority decision in FW/PBS, and due to the lack of definition of "prompt judicial review," a debate has subsequently ensued, which has left a split among the federal appellate circuit courts concerning the parameters of this issue. It has been debated whether "prompt judicial review" means mere access to, or initiation of, judicial review, or alternatively, whether it means receiving a prompt judicial decision on the merits. The Seventh Circuit, in dicta, found review by Illinois' common law writ of certiorari to be adequate. Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (en banc plurality decision), cert. denied, 114

S.Ct. 1837 (1994). (The discussion about "prompt judicial review" required when a municipality seeks to license an activity protected by the First Amendment in Graff, is dicta because it was not necessary to the holding, as the Seventh Circuit found that the plaintiff therein was not entitled to First Amendment protection. A decision on an issue unnecessary to the disposition of a case is dictum. State ex rel. Schultz v. Bruendl, 168 Wis. 2d 101, 112, 483 N.W.2d 238, 241 (Ct. App. 1992).)

Other courts have disavowed the Graff analysis:

> Graff was an en banc decision of the Seventh Circuit in which twelve judges participated. The appeal produced a badly divided court. . . . In addressing the argument that a Chicago licensing scheme for a newsstand did not provide 'prompt judicial review', the 'principal opinion' . . . concluded that . . . judicial review of the licensing decision was available through the common-law writ of certiorari. Although Judge Manion's opinion apparently concludes that this review is adequate to satisfy the 'prompt judicial review' requirement, it does not discuss whether the procedures available for common-law writ require prompt judicial decision. And, of critical importance, only five judges (including Judge Manion) joined this principal opinion. . . . Therefore, Judge Manion's opinion is not a majority opinion of the Seventh Circuit. Interestingly, the seven judges who wrote to concur in the judgment or dissent all indicate their disagreement with Judge Manion's conclusion that the mere availability of judicial review satisfied the prompt judicial review requirement. Thus, the Graff decision does not hold that the prompt judicial review requirement is satisfied when judicial review is merely available.

11126 Baltimore Blvd., Inc. v. Prince Georges County, Maryland, 58 F.3d 988, 1000, n.17 (4th Cir. 1995) (en banc), cert. denied 116 S.Ct. 567.

Other federal circuits have invalidated ordinances due to lack of provision for "prompt judicial review." The Sixth Circuit has ruled that the requirement of "prompt judicial review" means receiving a prompt judicial decision and has held that circumstances wherein an applicant might wait 60 days for a license denial to make its way through the administrative process and then wait an additional 90 days before receiving a judicial decision was impermissibly long. The Court found that the licensing scheme "fails to provide sufficient procedural safeguards and is unconstitutional" as a result. Eastbrook Books, Inc. v. City of Memphis, 48 F.3d 220,225 (6th Cir. 1995), cert. denied 116 S.Ct. 277. In Wisconsin, absent specific statutory requirements, judicial review by way of certiorari is quite open-ended as it regards the time in which a litigant may expect to receive a decision. In this case, the application for renewal was filed on November 17, 1995; the judicial decision was rendered April 2, 1997, a period of approximately 21 months, a period far in excess of that found impermissibly long in Eastbrook Books.

The Fourth Circuit, too, has interpreted "prompt judicial review" to mean prompt judicial decision, making reference to Justice O'Connor's language in FW/PBS to the safeguards required in Freedman that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period of time compatible with sound

judicial resolution." Baltimore Blvd., supra at 999 (citations omitted).

However, the case whose facts most closely parallel the circumstances of this case is that of Redner v. Dean, supra, 29 F.3d 1495. There, the Eleventh Circuit Court of Appeals considered an ordinance which provided that in the event of a license denial, the applicant may appeal within 15 days to a board, which is to schedule a hearing as soon as the board's calendar will allow. No specific time limit was set in which the board must either hear or decide the matter. While the Redner Court acknowledged that the Supreme Court "has not clarified exactly what type of judicial review is sufficient" it found the ordinance under review to be constitutionally inadequate under any interpretation of "prompt judicial review" because, since the ordinance provides no specific time frame in which the board must hand down an administrative decision, judicial review is potentially unavailable for an extended period of time while the administrative action is still pending. Redner, supra, 29 F.3d at 1502.

The circumstances in this case are much the same, inasmuch as the administrative proceedings may be prolonged indefinitely, by the absence of a requirement of a decision following a public hearing within any certain period of time. The effect of the potential for administrative delay is the possibility of an indefinite postponement of the judicial

remedy because, in Wisconsin, certiorari can only be invoked to review a final administrative decision. State ex rel. Czapiewski v. Milwaukee City Service Commission, 54 Wis. 2d 535, 196 N.W.2d 742 (1972). As a result, the procedures set out in Waukesha's licensing ordinance fail to guarantee prompt judicial review of an adverse decision; thus the ordinance is unconstitutional.

Although § 8.195(3)(d) requires a public hearing to be held within 10 days of a license denial, it does not list any time period after the hearing within which a decision must be rendered. Similarly, Waukesha Ordinance No. 2.11 and Wis. Stat. Ch. 68, both of which govern administrative hearings, are insufficient for the purpose of providing "prompt judicial review," for the same reason. While § 68.09 provides that an initial determination shall be reviewed within fifteen days of receipt of a request for a review, there is no requirement that the decision on the review be made within any certain period of time. Consequently, the Waukesha ordinance encompasses the exact situation described in Redner v. Dean, supra, where there is in fact no definite time limit at all contained on the face of the ordinance for the administrative review to be completed.

When coupled with the fact, addressed more specifically in the next section of this brief, that the ordinance, on its face, has no provision for retaining the status quo for applicants seeking renewal, this indefinite time period

imposes a "significant hardship on an adult bookstore and runs the risk of suppression of free speech for too long a period of time." 11126 Baltimore Blvd., Inc. v. Prince Georges County, Maryland, supra, 58 F.3d at 998 (4th Cir. 1995). An ordinance which permits administrative review to take up to any amount of time by placing no time limits for the issuance of a decision following a public hearing falls into the category of a prior restraint which fails to place time limits on the period of restraint, and is therefore constitutionally impermissible. Freedman, supra at 59; FW/PBS, supra at 226. The Waukesha ordinance is far less definite than the ordinance which was invalidated in FW/PBS which provided in mandatory terms that the chief of police "shall approve the issuance of a license . . . within 30 days after receipt of an application"; in spite of that language, the Court found that a delay could be caused. The Waukesha ordinance does not even provide any mandatory language as to the time within which a decision following a public hearing must be issued.

C. Waukesha's Licensing Ordinance is Unconstitutional Because it Fails to Preserve the Status Quo Throughout the Administrative Review Process.

In a related aspect, the ordinance is also constitutionally defective in that it does not explicitly require retention of the status quo pending judicial review of a license denial or revocation. In the instant case, the City of Waukesha has permitted City News and Novelty to continue

operating without interruption throughout the pendency of the judicial review. However, a bookstore is entitled to explicit protection in this regard, and need not simply rely on the charity or kindness of city officials. The Fifth Circuit Court of Appeals has specifically addressed this issue:

> The contention is that the County cannot constitutionally shut down an existing business while its application for a license is pending, and that TK's was operating when Denton County adopted its regulations. The County points out that it has not attempted to close TK's. . . .
>
> Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process. It is no answer that the County has not elected to do so. The absence of constraint internal to the regulation is no more than open-ended licensing. Businesses engaged in activity protected by the First Amendment are entitled to more than the grace of the state. . . .
>
> Because TK's was in business when the Order was adopted, its free speech activity cannot be suppressed pending review of its license application by the County.

TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705, 708 (5th Cir. 1994).

The Court in Wolff v. Monticello, also held that even if the city has not attempted to force an applicant out of business during the pendency of proceedings, the retention of the status quo must be explicit in the ordinance itself. Wolff, supra at 1574-75. The Fourth Circuit, too, has held that not only must the status quo be explicitly preserved throughout the administrative stage, but that it is preferable to extend it through the judicial review stage. Chesapeake,

supra at 1009; Baltimore Blvd., supra at 1001. The Waukesha ordinance not only does not explicitly provide for the retention of the status quo; in fact, on its face, it says the opposite, at § 8.195(2)(a), which states, "no adult establishment shall be operated . . . without first obtaining a license to operate." When the lack of preservation of the status quo is coupled with the lack of definitive time limits, the Waukesha ordinance has the potential for long-term restraint of expression prior to any type of judicial review. As a result, it is constitutionally defective on its face and, therefore, invalid.

III. CITY NEWS AND NOVELTY, INC., WAS DENIED DUE PROCESS IN THE DENIAL OF ITS LICENSE.

It has been twenty-five years since the federal courts of Wisconsin declared without question that one's expectation of renewal of a business license as a matter of law rises to the level of a property interest, and therefore, one cannot be deprived of that property interest without being afforded procedural due process. Manos v. City of Green Bay, 372 F.Supp. 40, 49 (E.D. Wis. 1974); Misurelli v. City of Racine, 346 F.Supp. 43 (E.D. Wis. 1972). The business license discussed in Manos was a liquor license. An interest in a renewal of a license which permits the dissemination of expressive materials can only be entitled to more, not less, constitutional protection. Chapter 68, Wis. Stats., attempts to codify the requirements of due process in hearings held on behalf of persons aggrieved by decisions of municipalities.

The decision to renew a license is a quasi-judicial function and must conform to the standards of due process:

> Since licensing consists in the determination of factual issues and the application of legal criteria to them -- a judicial act -- fundamental requirements of due process are applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be in conformity to fair practices of Anglo-Saxon jurisprudence (citations omitted), which is usually equated with adequate notice and a fair hearing.

Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964), quoting SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454 (1943).

As will be shown in detail below, the procedures followed by the Common Council of Waukesha were not adequate, either according to the terms of Ch. 68, Wis. Stats., or under constitutional guidelines.

A. City News and Novelty, Inc., Was Deprived of an Administrative Review by an Impartial Decision Maker.

The Supreme Court has mandated that impartiality is an essential element of due process, stating, "a fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 346 U.S. 133, 75 S.Ct. 623 (1954). The Wisconsin Supreme Court concurs that both impartiality and the appearance of impartiality weigh heavily in due process considerations. The criteria for review of questions of impartiality are set out in Guthrie v. Wisconsin Employment Relations Commission, 111 Wis. 2d 447, 331 N.W.2d 331 (1983), where the Court found there can be a denial of due process when the risk of bias on the part of the decision-maker is impermissibly

high, even if there is no bias or unfairness in fact. The principle elucidated by Guthrie can be summed up as "no man can be a judge in his own case." Id. at 336. Wisconsin's Administrative Procedure Act recognizes the inherent unfairness, or at least the appearance thereof, and allowing one to review his own decisions by providing that at a hearing on administrative appeal, "the municipality shall provide an impartial decision maker, . . . who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal." Wis. Stat. § 68.11(2).

In this case, Mayor Opel signed the December 19, 1995, Resolution denying renewal of the license, the initial determination. She also presided over the Common Council when it conducted the § 68.09 Review. By statute, Mayor Opel is the Chief Executive Officer of the City of Waukesha. § 62.09(8)(a), Wis. Stats. Among the powers entrusted to a mayor of a municipality, also by statute, is the power to veto all acts of the common council. § 62.09(8)(c), Wis. Stats. Mayor Opel's action in signing, and thereby signifying her approval of, the Council's Resolution denying renewal of the license was not an insignificant or purely formal action. When the Resolution came to her for signature, she had a choice: she could approve the Resolution or she could veto it. She chose to approve the Resolution. Therefore, she participated in making the initial determination. Conse-

quently, she was disqualified, both by the terms of § 68.11, Wis. Stats., and by constitutional considerations of impartiality, from presiding over the administrative review.

B. In Several Respects, City News and Novelty, Inc., Was Deprived of Adequate Notice.

1. Evidence Was Introduced at the Administrative Review Hearing Beyond the Allegations Set Out in the December 19, 1995, Resolution.

On December 19, 1995, Waukesha's Common Council denied the application of City News and Novelty, Inc., to renew its license and in so doing, set forth the grounds for its denial, enumerated above. The appellant contends that, on administrative review, the city was limited to presenting evidence which supported only those grounds, and no other, inasmuch those were the only grounds as to which City News and Novelty, Inc., had been put on notice that its renewal had been denied.

The two most often cited elements of due process are notice and a meaningful opportunity to be heard. Manos, supra 372 F.Supp. at 50. In this case, the requirement of notice, first and foremost, translates into a requirement that the applicant, at its administrative review hearing, has been previously put on notice of the allegations against it by the city in its Resolution. The testimony and allegations of Timothy Morgan, including Exhibits 33 and 43, and the testi-

mony and allegations about Jamie Barr, including Exhibits 36 and 37, all should have been excluded from evidence as beyond the scope of the allegations contained in the Resolution, and therefore beyond the scope of the notice provided to City News and Novelty, Inc. Allowing the city to present allegations of which City News and Novelty, Inc., had no prior notice was contrary to "the fundamental requirement of due process . . . notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [To satisfy procedural due process,] notice must be of such a nature as reasonably to convey the required information." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).

2. The Review Board Found that City News and Novelty, Inc., Committed a Violation of the Open Booth Provision on a Totally Different Date than that Alleged in the Resolution.

In the Resolution denying renewal of City News and Novelty, Inc.'s, license, one of the grounds was "Whereas, on 11/30/94, 12/1/94, and 12/2/94 City News and Novelty, Inc., . . . violated the provisions . . . of . . . the Waukesha Municipal Code by failing to have every booth . . . totally open to a public lighted aisle . . permitting an unobstructed view at all times of anyone occupying the same."

However, at the Administrative Review Hearing, Building Inspector Lemke testified that the problem with the openings to the booths had been corrected prior to November 30, 1994. He was quite specific on this point, and his verbal testimony was corroborated by his written memoranda. However, rather than finding that the activity which was the basis for this element of the denial of license had not occurred as alleged, the Board found that an open booth violation had occurred on November 7, 1994, the date of Inspector Lemke's first visit (of a series of visits). (See, A-8-9, ¶ 16 B 1) City News and Novelty, Inc., was given no notice that a violation was alleged to have occurred on November 7, 1994. City News and Novelty, Inc., had received citations for activities on November 30 and the subsequent dates and indeed had been convicted in municipal court (based on testimony from Inspector Lemke which was at odds with his sworn testimony at the hearing). However, City News and Novelty, Inc., had never received a citation for a violation on November 7, and this was not a ground cited by the Common Council's Resolution for nonrenewal of the license.

The constitution requires sufficient notice, that is to say, reasonable particularity regarding times and dates of offenses alleged so that one may meet the accusation and prepare to defend against it. U.S. v. Parente, 449 F.Supp. 905, 914 (1978). An accusation is insufficiently definite if it does not specify with reasonable particularity the time at

which the offense is alleged to have occurred. Wong Tai v. United States, 273 U.S. 77 (1927). Although the exact date of an offense is ordinarily not an essential element of that offense, when the evidence focuses on a certain date, and the defendant relies on that evidence, it is plain error for the decision to rest upon another date of offense. State v. Kinney, 519 N.E.2d 1386 (Ohio App. 1987).

Due process requires that one in jeopardy of serious loss be given "notice of the case against him and the opportunity to meet it." Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-72 (1950)). The ability of one accused to meet the case against him is "crucial." Kaczmarczyk v. Immigration and Naturalization Service, 933 F.2d 588, 596 (7th Cir. 1991). Here, City News and Novelty, being accused of offenses on certain dates, and having heard testimony which definitively exonerated it from having committed violations on those dates, had no way to know that any further defense was needed. Having been placed on no notice that it was in any jeopardy for a purported November 7 violation, City News and Novelty strategically chose not to present further evidence. That choice was based on the very reasonable assumption that it had already adequately disproved the allegation with which it was charged. Since City News and Novelty had no notice of, an no way of knowing that, the allegation would be extended backward

for three weeks, it certainly had no opportunity to meet that accusation.

This very principle has been supported by the Court of Appeals of Wisconsin in decisions which hold that a defendant cannot be held accountable for a continuing offense which is alleged to have begun before the date of offense alleged in the information against him. In State v. Kaufman, 188 Wis. 2d 485, 425 N.W.2d 138 (Ct. App. 1994), rev. denied, the Court reversed the conviction of an AFDC recipient from guilty of misdemeanor welfare fraud. The Court did so because the defendant had been charged with failing to notify the authorities of a change in her circumstances between June 21 and September 22, 1991; however, at trial there was no evidence of failure to notify during these dates. Instead, the state contended that the offense alleged to have occurred between June 21 and September 22 was a continuing offense which began prior to June 21, and therefore, other evidence, which indicated that the defendant had failed to report a change of circumstance in 1988, was sufficient to support a conviction. The Court of Appeals ruled otherwise, stating:

> We disagree with the State that Kaufman can be held accountable for a continuing violation beginning at a date not alleged in the information. 'One of the essential functions of the information is to provide the defendant with sufficient details regarding the nature of the charge and the conduct which allows the accusation to allow her . . . to prepare or conduct a defense. . . . When informing the accused, the time frame in which the crime allegedly occurred is one of the underlying facts that should provided.'. . . Kaufman did not have notice that she would have to prepare a defense to a

> continuing violation regardless of when Kaufman's failure to report allegedly occurred, this critical date was not stated in the information and cannot now be considered without violating Kaufman's rights of due process.

Id., 525 N.W.2d at 140 (internal cites omitted)

Although the proceeding in Kaufman was a trial on a criminal misdemeanor, as opposed to an administrative review of a license nonrenewal, the due process principle of right to adequate notice is identical in both cases. The finding of the Board that a violation must have occurred some three weeks prior to the date of the alleged violation is tantamount to turning the individually alleged violations into a continuing violation of which City News and Novelty had no notice. To use this as a basis for nonrenewal of the license amounts to a violation of due process.

3. City News and Novelty, Inc., Should Have Been Given the Opportunity to Correct its Shortcomings.

Any ordinance which permits deprivation of property must be a "reasonable legislative enactment for the achievement of a legitimate state object." Mullane, supra, 399 U.S. at 306. Ordinances are only held to be "reasonable" if a license holder is put on notice that there is a potential problem, so that the owner may take affirmative action to abate any questionable activities. If the city denies an owner the ability to pursue self-remedying measures, this result is unreasonable. City of St. Paul v. Spencer, 497

N.W.2d 305 (MN App. 1993). Therefore, the appellant asserts that the city, by neither notifying it informally of its concerns nor seeking the more minor penalty of a suspension of its license for any one of the allegations, acted unreasonably in "saving up" all of its complaints past the point where the applicant could effectively remedy them and abate the problems without suffering nonrenewal. Specifically, the appellant points to the allegations of sexual activity on the part of patrons, resulting from convictions in court proceedings as to which the appellant was neither a party nor received notice, as well as the incidents in 1995 which involved juveniles sneaking into the store, where City News and Novelty, Inc., was not given a citation or any official notice of the error. By structuring the sanction of City News and Novelty as a nonrenewal, City News and Novelty will be unable to renew its license for at least five years, whereas a suspension, which might have alerted City News and Novelty early on that it had potential licensing problems, would have lasted only 30 days, and a revocation for only one year. (See A-46 and 47, contrasting the provisions of § 8.195(4)(b)2 with those of § 8.195(8)(a)2 and (d).)

In assessing whether or not City News and Novelty, Inc., would have responded positively, had it been given prior notification that the city considered these circumstances symptomatic of a problem, note should be taken of the unrefuted testimony about recent measures undertaken by City News and

Novelty, Inc., including removal of the video viewing booths, rearrangement of the interior of the store so that a patron is checked for identification immediately upon entry and is no longer able to see sexually explicit materials until after being so checked, and the acquisition of the highly technical, more effective, age-checking video monitor. (T3, 88, 111-114, 118-120)

It is troubling that the board has apparently utilized a sub rosa theory of strict liability without ever articulating it as such. At the hearing, the city made much of the fact that the patrons in the video viewing booths could not be seen by the clerk on duty. However, the decision of the federal court in the Eastern District of Wisconsin, which construed a virtually identical ordinance in the City of Delafield, made clear that the ordinance requires only that the inside of the booths be visible from the contiguous aisle and does not necessitate that the booths be visible from the clerk's position near the cash register. Suburban Video, Inc. v. City of Delafield, 694 F.Supp. 585, 588, n.2 (E.D. Wis. 1988). As the "fundamental requirement" of due process is "the opportunity to be heard at a meaningful time and in a meaningful manner," Mathews v. Eldridge, 424 U.S. 319, 333 (1976), a licensing ordinance which permits deprivation of the license with no opportunity to be made aware of, and hence, to correct, a problem does not afford meaningful notice; therefore, procedural due process is offended. A licensing

ordinance, which by its operation seeks the laudable goal of prevention of lewd behavior but does nothing to enlist or permit the aid of the owner of the licensed property in curing the problem is neither rational nor substantially advances a legitimate state interest, so substantive due process is also affected. Williamson v. Lee Optical, 348 U.S. 483 (1955); Yee v. City of Escondido, 503 U.S. ___, 112 S.Ct. 1522 (1992). a licensing ordinance which permits revocation of a license, thus permitting a five-year ban on operation of an adult bookstore, without affording the operator a prior opportunity to cure a problem of which it has had no prior notice operates as a de facto ban denying the bookstore a reasonable opportunity to operate, in violation of Playtime Theaters, Inc. v. City of Renton, 475 U.S. 41, 54 (1986).

Another factor which militates toward the requirement that the bookstore operator be permitted an opportunity to be made aware of and to correct the problem is the harshness of the penalty. The Wisconsin Supreme Court has judicially engrafted scienter as a required element of an offense, even when scienter is not mentioned within the terms of the statute prohibiting certain behavior when the penalty is severed. State v. Colova, 79 Wis. 2d 473, 255 N.W.2d 581 (1977). Although Colova was based on a traffic misdemeanor, operating after license is revoked, a more recent case, State v. Olson, 175 Wis. 2d 628, 498 N.W.2d 661 (1993), found that the criminal penalty was not the sole factor on which the

Colova decision was based. In Olson, the prosecutor had argued that since the legislature had now decriminalized OAR, the scienter element was no longer applicable. The Wisconsin Supreme Court said it was concerned with this "narrow reading" of Colova and explained that although the Colova Court used the penalty associated with OAR as a "gauge of the legislature's intentions," a number of factors needed to be considered when a court is confronted with a statute which is silent with respect to scienter. Olson, 498 N.W.2d at 666. Here, the penalty of a complete ban on the dissemination of materials protected by the First Amendment for five years is undeniably harsh and, although not a criminal penalty, can be equated with the penalties for OAR in Colova and Olson.

The net effect of this combination of factors is that City News and Novelty was denied renewal of its license, in part, based upon activities of third parties, over which it had no control, of whose acts it had no notice at the time the acts were committed. Moreover, rather than the city calling its concerns to the attention of the operator of the store immediately, or alternatively imposing some lesser degree of punishment upon the store, the city silently bided its time until it could "justify" nonrenewal of the license. There is no rationale for this failure to allow City News and Novelty the opportunity to correct its own shortcomings other than one which is legally impermissible, i.e., the desire to suppress the politically unpopular sexually explicit materials which

City News and Novelty disseminates. However, the burden is on the city to demonstrate "the existence of a substantial and legitimate state interest that is unrelated to the suppression of free expression and that cannot be effectuated by means that impact less drastically on protected freedoms." Genusa v. City of Peoria, 619 F.2d 1203, 1219 (7th Cir. 1980).

Because the licensing ordinance lacks discernible standards, the city is apparently free to choose, at will, whether to act informally, to impose a brief suspension, to impose a one-year revocation, or as it did in this case, to deny renewal for five years. However, this freedom of action on the city's part does not comport with the well-known tenet that "preservation of freedom of expression requires protection of the means of disseminating expression," and therefore, the city's actions must be proven to have been the least drastic alternative which would have reasonably accomplished the city's legitimate interest, unrelated to the suppression of free expression. Bantam Books, Inc. v. Sullivan, 371 U.S. 58, 64-65, n.6 (1963); Genusa, supra, 619 F.2d at 619, n.21.

IV. THE GROUNDS UPON WHICH THE NONRENEWAL WAS AFFIRMED WERE INADEQUATE AS A MATTER OF LAW.

The Board affirmed as a basis for nonrenewal of the license, the findings that in February and March, 1995, patrons were arrested for masturbating in the viewing booths, and both of these arrests led to the patrons' convictions of lewd and lascivious conduct. The plaintiff asserts that these

two incidents cannot be a basis for nonrenewal of its license. If there are any standards at all which are applicable to renewal of a license, they can only be the standards which also govern the issuance of a new license, set forth at § 8.195(4)(b)2 which say that a corporate applicant, in order to receive a license, must meet the following standard: no officer, director or stockholder required to be named under ¶ (3)(b) shall have been found to have previously violated this section within five years immediately preceding the date of the application. A plain reading of this ordinance shows that only violations of officers, directors, or stockholders can act as disqualifiers to receiving a license; actions by patrons are not named as a ground for disqualification. As has already been explained in detail previously, since a licensing scheme for a business which deals in sexually explicit but constitutionally protected speech is a prior restraint on that speech, such prior restraint is constitutionally permissible only if the regulation contains safeguards which minimize the possibility that the licensing procedure will be used to suppress politically unpopular speech. FW/PBS, supra. An ordinance which subjects the exercise of First Amendment freedoms to the prior restraint of licensing regulation is unconstitutional unless that ordinance contains narrow, objective, and definite standards which guide the licensing authority. Shuttlesworth, supra. In order to comply with this constitutional mandate, the terms of the

ordinance must be narrowly construed, in order to eliminate the subjective factor from the decision whether or not to grant a license:

> The state may subject the exercise of First Amendment freedoms to the prior restraint of a license requirement, but only where it provides 'narrow objective and definite standards to guide the licensing authority.'

Grandco Corp. v. Rockford, 536 F.2d 197 (7th Cir. 1976)

Here, the ordinance is unambiguous and must be construed according to its own language. State ex rel. Smith v. City of Oak Creek, 139 Wis. 2d 788, 407 N.W.2d 901, 904 (1987). The words of the ordinance mean just what they appear to mean, and additional words and meanings may not be added, in construing the ordinance. Cassanova Retail Liquor Store, Inc. v. State, 196 Wis. 2d 947, 540 N.W.2d 18 (Ct. App. 1995), review denied 546 N.W.2d 471.

As the subsection of the ordinance which enumerates the standards for granting a license permits disqualification only upon the violation of the ordinance by an officer, director or shareholder, the offenses committed by patrons must be eliminated as a ground for nonrenewal of the license, according to basic standards of statutory construction, within the framework of First Amendment Constitutional protections.

The Appeals Board also affirmed the "findings" of minors being present in the store on July 23, October 18, and November 29, 1995 (see ¶¶ 16A, 2, 3 and 4, pp. 6-8 of the Decision). The plaintiff asserts that, as City News and

Novelty, Inc., has never been convicted, even in municipal court, of these violations, the events cannot serve as a basis for findings as that concept is used in § 8.195(4). Denial of a license on the basis of a mere accusation does not pass constitutional scrutiny. Dumas v. Dallas, 648 F.Supp. 1061, 1074 (N.D. Tex. 1986), affirmed in part, reversed in part (on other grounds) sub nom., FW/PBS, supra. Denial of a license on the basis of mere accusation of a crime constitutes punishment without the requisite finding of guilt. The fact that a citation has been issued is only sufficient to show that an offense may have been committed, not sufficient for a "finding." United States v. Calandra, 414 U.S. 338, 344-45 (1974). Consequently, these allegations cannot be permitted to satisfy the requirement that a violation of the ordinance "have been found"; additionally, even if the violations are found (for the first time, by the council) to have occurred, they clearly were not committed by an officer, director or stockholder of the corporation, and cannot serve as disqualifiers.

The sole remaining ground upon which the board affirmed nonrenewal of the license was the incident on December 24, 1994, involving a minor in the store, for which incident an employee of City News and Novelty, Inc., and Daniel Bishop, an officer of the corporation, had been convicted of an ordinance violation in municipal court. (See, A-12, ¶ 16A 1) Although a conviction had been entered in

municipal court in regard to this incident, this Court can take judicial notice that an appeal was taken, and as a result, the conviction has been vacated and the prosecution dismissed with prejudice. (A-50-51) (The Court of Appeals may take judicial notice of other circuit court files, at any stage of the proceedings. Teacher Retirement System v. Badger XVI, ___ Wis. 2d ___, 556 N.W.2d 415, 418, n.3 (Ct. App. 1996).)

A municipal court is not a court of record. Wis. Stat. § 800.13(2). An appeal to circuit court of a conviction in municipal court acts automatically to stay the execution of judgment, and results in a determination de novo on all issues. Wis. Stat. § 800.14. The appellant asserts that in order to avoid the subjective discretion which is not permitted in a licensing ordinance, and to avoid the constitutional vagueness problems, the requirement that a violation have been "found" in order to justify a license nonrenewal must be read to require a conviction in a court of record. If so, the only remaining basis for nonrenewal is eliminated.

CONCLUSION

Licensing, like censorship, creates "the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to insure prompt issuance of the license." FW/PBS, supra at 226. The two evils that cannot be tolerated, unbridled discretion in the hands of government officials and failure to explicitly

place adequate time limits on a prior restraint, are both present in the Waukesha licensing ordinance, and therefore the ordinance must be found unconstitutional. In addition to the lack of explicit safeguards in the ordinance on its face, safeguards intended to be offered by the due process hearing were lacking inasmuch as the mayor was not an impartial decision maker, as required by both Ch. 68 and by the constitution, and the notice provided was inadequate on several grounds. Finally, the very allegations themselves which served as bases for the license nonrenewal are inadequate as a matter of law, and as a matter of statutory and constitutional construction. Therefore, the appellant respectfully requests that this Court reverse the decision of the Administrative Review Appeals Board.

Dated this 16th day of July, 1997

Respectfully submitted,

CITY NEWS & NOVELTY, INC., Plaintiff

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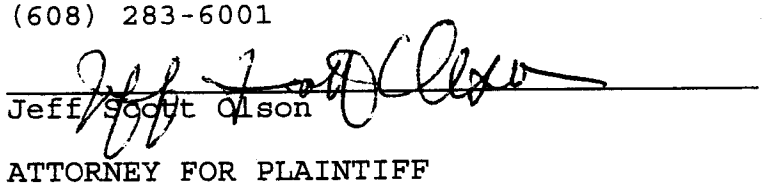

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